BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHAD RODRIGUEZ	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,035,508
	)	
DILLON COMPANIES, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent, a qualified self-insured, requests review of the September 24, 2007 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) concluded that "it is more probably true than not true, that he was injured while working for the respondent and that his injury arose out of and in the course of employment. Specifically, the evidence indicates that claimant's work activities aggravated a pre-existing or prior back condition."[1] Accordingly, she ordered respondent to provide medical treatment with Dr. Fluter[2] and to pay temporary total disability compensation commencing June 5, 2007.

The respondent requests review of this decision although no brief was filed supporting this appeal. Based upon the arguments made at the preliminary hearing, it appears that respondent disputes that claimant's present back complaints relate to his work activities. And that claimant's belated assertion of an April 5, 2007 work injury came in response to a disciplinary measure rather than as a sincere notification of an accident.

Claimant requests the Board affirm the ALJ's Order.

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[1] ALJ Order (Sept. 24, 2007) at 1.

[2] The parties agreed that if this claim was found compensable that Dr. Fluter would be designated as the authorized treating physician.

Based upon the Application for Review, the only issue to be determined in this appeal is whether the claimant met with personal injury by accident arising out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board makes the following findings of fact and conclusions of law:

Claimant is an order filler for respondent, assigned to pick product and place it on a pallet for shipping to the respondent's retail stores. There is no dispute that this job requires claimant to bend, stoop and lift repetitively during his shift.

In January 2007, claimant was injured in an automobile accident while on the way to work. He was a passenger in the car and according to claimant, suffered a whiplash type injury. He was taken to the emergency room and released. He sought further treatment with his personal physician who, following a single visit, released claimant to return to work, without restrictions, but with medications.

Claimant returned to work performing his normal work duties. Over the course of the next few months, respondent contends that claimant's work performance suffered. Claimant's supervisors testified that each time they counseled or inquired of claimant as to why his performance was slipping, he blamed the car wreck and its effect on his back.

Claimant testified that from early April to May 31, 2007, his low back became progressively more painful due to his work activities. On that date, claimant wanted to leave due to his back pain. But according to claimant, when he told Clay Bass (a supervisor) of his problem, Mr. Bass asked him to continue working. Claimant did so, eventually laying down on some pallets to let his back rest. Claimant went on to testify that his back continued to hurt and William Groshans, one of his supervisors, ended up taking him to one of the local emergency rooms.

Not surprisingly, Mr. Groshans and Eric Belden, another of claimant's supervisors, tell a slightly different story. According to them, claimant had been counseled 3 times in the 6 months leading up to May 31, 2007 for his poor work performance. And in each instance, claimant would attribute his problem to the January 2007 car wreck and his resulting back problems.

Then on May 31, 2007, Mr. Belden and Mr. Groshans called claimant in again and counseled him for the 4th time for his lack of production. In this instance, claimant was to be suspended. According to Mr. Belden, claimant offered no excuse and left the meeting but returned sometime later. At that point he requested to fill out an accident report for a back injury. Mr. Belden asked when this supposed accident was to have occurred and

eventually claimant assigned April 5, 2007 as the date, although claimant now says nothing happened on that date, that his problems occurred over time.

Mr. Groshans' testimony is similar to that of Mr. Belden's. And he adds that when he was taking claimant to the hospital, he again questioned claimant about whether these complaints were due to the car wreck. According to Mr. Belden, claimant responded by saying "[w]ell Bill, I'm not sure where it happened. It could have happened in the car wreck, it could have happened at work, I'm not really sure," . . . "[b]ut I didn't come in today with the purpose of filling out this accident report, but I had no choice because I was getting written up and getting ready to be suspended".[3]

Then while claimant was at the doctor's office retrieving his medical records, Mr. Groshans says he overheard a physician asking claimant why he waited so long to fill out an accident report and claimant responded by saying "D-Day, I had to make a decision or I was getting in trouble at work."[4]

After hearing this testimony, the ALJ concluded claimant had satisfied his burden of establishing that he suffered an accidental injury arising out of and in the course of his employment. And because the ALJ had the opportunity to see each of the witnesses and evaluate their credibility, her opinion is entitled to some deference.

Respondent's contention that claimant was injured in an automobile accident in January 2007 rather than while working is understandable. And although he returned to work following that accident, it is uncontroverted that claimant's work performance suffered and gave rise to disciplinary measures. And on May 31, when respondent's supervisors handed claimant his 4th and most serious discipline for his performance shortcomings, only then did claimant assert a work-related injury arbitrarily dating back to April 5, 2007.

Nonetheless, this Board Member has reviewed the record as it now stands and concludes that, *by the barest of margins*, claimant has established an aggravation of his back condition. Accordingly, the ALJ's preliminary hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[5] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

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[3] P.H. Trans. at 38.

[4] *Id.*

[5] K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated September 24, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2007.

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BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Edward J. Heath, Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge